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FILED  
JUL 18 - 1987  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

McGREGOR SEA & AIR SERVICES  
(AMERICA) INC., A Delaware  
Corporation,

Plaintiff,

vs.

CINEMATRONICS, INCORPORATED, A  
California Corporation,

Defendant.

CASE NO. 491479

POINTS AND AUTHORITIES IN  
SUPPORT OF APPLICATION TO  
SET ASIDE RIGHT TO ATTACH  
ORDER, QUASH WRIT OF ATTACHMENT,  
AND RELEASE ATTACHED PROPERTY

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PRELIMINARY STATEMENT

This Court has apparently been seriously misled into the issuance of an ex parte writ of attachment, without notice to the defendant, where the result may be to destroy the goodwill and operations of an extremely valuable business. Plaintiff, a supplier, is clearly aware that it has no current claim against defendant having entered into a novation for valuable consideration, yet has apparently failed to advise the Court of this fact. Furthermore, even if one assumed arguendo that plaintiff had a valid, current and existing claim, plaintiff has sought to attach all the property of

1 an extremely valuable business, rather than limiting its  
2 attachment to those properties which would perfectly secure  
3 its claim. The result is a serious abuse of the attachment  
4 procedure which should be corrected by this Court immediately  
5 before irreparable harm is done to the defendant's business.

6 II

7 THE WRIT SHOULD BE QUASHED BECAUSE PLAINTIFF'S  
8 CLAIM IS UNMERITORIOUS.

9 In this case there has been a written novation  
10 of the contract, which is the subject of plaintiff's suit.  
11 The novation is clearly set out in the attachments to the  
12 declaration of Mr. Pierce attached hereto. Novations  
13 extinguish the original obligation and substitute a new  
14 obligation. In this case an obligation to make another  
15 payment after six months. See, e.g., Civil Code 1530, 1532,  
16 Beckwith v. Sheldon, 165 C. 319 (1913). A novation need  
17 not be written even if the original contract was in writing.  
18 Producers Fruit Co. v. Goddard, C.A. 737 (1925). However,  
19 in this case, the novation clearly is in writing. Furthermore,  
20 whereas consideration is required for a novation, the  
21 consideration may simply be the release of the old obligation.  
22 Manfre v. Sharp, 210 C. 479 (1930). As proven in the declaration  
23 of Mr. Pierce the novation here is supported by the consideration  
24 of an immediate payment of \$10,000.00, receipt of which  
25 has been acknowledged by the plaintiff.

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3 Under the circumstances, plaintiff clearly has  
4 no current claim for the balance on its account with defendant.  
5 Its claim is premature, and the application for writ of attachment  
6 should be denied.

7 **III**

8 ASSUMING ARGUENDO THE VALIDITY OF PLAINTIFF'S  
9 CLAIM, ITS ATTACHMENT IS EXCESSIVE.

10 In this case, plaintiff has purported to attach  
11 all the assets of a substantial business rather than limiting  
12 its attachment to the amount of its claim. Thus, even if  
13 the Court were to find that plaintiff's claim is right, which  
14 we vigorously deny, the attachment is greatly excessive to  
15 the prejudice of defendant. The attachment should be limited  
16 to an amount which will secure plaintiff's claim and not  
17 be extended to an amount which will damage the ongoing business  
18 of the defendant.

19 **IV**

20 CONCLUSION

21 For the reasons set forth above, the order granting  
22 writ of attachment in this case should be set aside, the  
23 writ quashed, and the attachment levy released.

24 DATED: September 8, 1982.

25 GRAY, CARY, AMES & FRYE

26 BY: 

JAY D. HANSON

27 ATTORNEYS FOR DEFENDANT  
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